

Protection of Persons (Natural and Juridical)

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The publication of the *Restatement (Third) of the Foreign Relations Law of the United States*¹ in 1987 is an important event, for international law has undergone substantial and significant change since the appearance in 1965 of its predecessor, the *Restatement (Second) of the Foreign Relations Law of the United States*.² The new *Restatement* is a comprehensive revision of the original *Restatement*, both in its expanded scope and its treatment, and it reflects important developments in international law since the original *Restatement*. It seeks to come to grips with the transformations wrought by the changing demands and expectations of the peoples of the world, interacting under the ever-changing conditions of growing interdependence and universal participation, as punctuated by the shifting patterns of alignments and the universalizing trends of science-based technology.

The new *Restatement* has condensed certain areas treated at length by the previous *Restatement* (for example, recognition and state responsibility for injury to aliens), and has dealt with subject matters not covered or just touched upon in the previous *Restatement*.³ One of the most notable and welcome additions to the new *Restatement* is the growing field of international human rights law, treated in Part VII, which is the focus of the present review.

After an overview of Part VII, this review will examine the following: (1) the conjunction of the international law of human rights and the customary law of state responsibility for injury to aliens; (2) the customary international law of human rights; (3) the standard of compensation for expropriation of alien property; (4) the rights of aliens; and (5) the remedies for violations of human rights obligations.

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)].

2. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter RESTATEMENT (SECOND)]. Even though this volume belonged to the second series of American Law Institute restatements, it was the original restatement on foreign relations law of the United States.

3. These subjects are the law of the environment, the law of human rights, and selected areas of international economic law.

I. Overview of Part VII

Part VII of the new *Restatement*, dealing with “Protection of Persons (Natural and Juridical),” contains three chapters and eight sections. They are:

Chapter One. International Law of Human Rights

- § 701. Obligation to Respect Human Rights
- § 702. Customary International Law of Human Rights
- § 703. Remedies for Violation of Human Rights Obligations

Chapter Two. Injury to Nationals of Other States

- § 711. State Responsibility for Injury to Nationals of Other States
- § 712. State Responsibility for Economic Injury to Nationals of Other States
- § 713. Remedies for Injury to Nationals of Other States

Chapter Three. Individual Rights in Foreign Relations: Law of the United States

- § 721. Applicability of Constitutional Safeguards
- § 722. Rights of Aliens

Chapter One expresses the important developments of international human rights law since the original *Restatement*, describing the obligations of a state under customary international law and international agreements to respect the human rights of nationals and non-nationals subject to its jurisdiction. Accordingly, the scope of human rights is broadly defined as including “freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives.”⁴ This broad conception of human rights is fitting and useful, in keeping with the dynamic nature of human rights claims and decisions in the contemporary world.

Chapter Two deals with the obligations of a state toward nationals of other states under customary international law. The concern is twofold: respect for the human rights of individuals of foreign nationality, and respect for the property interests of persons (juridical as well as natural) of foreign nationality. This chapter represents a substantial condensation and reorganization of the original *Restatement's* lengthy treatment of state responsibility for injury to aliens, but it is not a significant departure in substance.

Chapter Three sets forth certain principles of U.S. constitutional law protecting individual rights that have special bearing on U.S. foreign relations, including the rights of aliens.

4. RESTATEMENT (THIRD) § 701 comment a.

Both Chapters One and Three are additions, and chapter two is a condensed version of the discussion in the previous *Restatement*. By grouping these materials in the context of the "protection of persons (natural and juridical)," the *Restatement* reflects the growing impact of contemporary human rights law on the treatment of aliens, and gives impetus to the efforts toward synthesizing the contemporary international law of human rights and the customary law of state responsibility for injury to aliens. This fusion approach was taken despite objections that fusing the developing human rights law concerned with natural persons with the well-established norms of state responsibility for injuries to aliens, applicable to juridical as well as natural persons, is likely to undercut the customary norms for the protection of aliens, especially in connection with the issue of expropriation.⁵ The next section examines the basis for this fusion, explaining that customary international human rights law already binds states in their treatment of aliens.

II. The Conjunction of the International Law of Human Rights and the Customary Law of State Responsibility for Injury to Aliens

The overriding organizing principle of Part VII of the new *Restatement* is the conjunction of the international law of human rights and the customary law concerning responsibility of states for injury to aliens. This structure, building on others' previous efforts toward synthesis,⁶ sets the tone and direction for the treatment of "Protection of Persons" in the new *Restatement* and projects a reforming outlook. It is a giant step forward.

The contemporary international law of human rights and the customary law of responsibility of states for injury to aliens, though often regarded as distinct in origin, historical development and jurisprudential underpinnings, have shown remarkable affinity and strength for convergence. As discussed below, they converge while retaining independent vitality and thus reinforcing each other.

5. See, e.g., Carbonneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement*, 25 VA. J. INT'L L. 99 (1984).

6. See, e.g., M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND THE WORLD PUBLIC ORDER* ch. 14 (1980) [hereinafter *HUMAN RIGHTS AND WORLD PUBLIC ORDER*]; see also R. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 41-61 (1984); Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 1, 16-29 (R. Lillich ed. 1983); Lillich, *The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who Are Not Citizens of the Country in Which They Live*, 70 AM. J. INT'L L. 507 (1976).

Customary international law for the protection of aliens is well developed. When the nation-state was regarded as the only subject of international law and the question of human rights was considered a matter of domestic jurisdiction, customary law developed to protect aliens who still owed allegiance to the state of their nationality despite their physical presence in the host country. Aliens in the host country are “nationals abroad” from the perspective of the state of their nationality; they provide an important power base for a nation-state. Hence, any deprivation imposed on nationals abroad is regarded as an offense against the state of nationality, and the remedy for the deprivation runs to the state, though the injured person is generally required to exhaust domestic remedies before turning to the state of nationality for protection.⁷

Within the broad, historic development of this unique customary law for the protection of aliens, two different standards of state responsibility—“national treatment” and a “minimum international standard”—have vied for general community acceptance. The first principle maintains that aliens should receive equal, and only equal, treatment with nationals, and the latter insist that, however a state may treat its nationals, there are certain *minima* required for the humane treatment of aliens. A review of the flow of decisions and communications in the development of the customary law about aliens, and especially in the recent, more general human rights prescriptions, appears to sustain the position that the minimum international standard, protecting all human beings where they reside, has become present general community expectation.⁸

The contemporary global human rights movement—heir to other great historic movements for human dignity, freedom and equality—has largely developed since the creation of the United Nations. It expresses the enduring elements in most of the world’s great religions and philosophies and builds on the findings of modern science about the interdependence between respect for human dignity and all other values.

The lessons of World War II, and in particular the atrocities of the Third Reich, painfully taught the world that large-scale deprivations of human rights not only decimate individuals and groups but also endanger the general peace and security. Hence the U.N. Charter underscored the close link between human rights and peace and security, the intimate interplay between minimum world order (*i.e.*, minimizing unauthorized coercion) and optimum world order (*i.e.*, the widest possible shaping and

7. See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 866-78.

8. See *id.* at 749-58.

sharing of all values). The promotion and protection of human rights was made a prime objective of the United Nations, along with the maintenance of peace and security and the promotion of self-determination.⁹

The peoples of the world, whatever their differences in cultural traditions and institutional practices, today demand most intensely all those basic rights conveniently summarized in terms of the greater production and wider sharing of the values of human dignity. These demands have received authoritative expression not only in the U.N. Charter, but also in a host of other human rights prescriptions, from the Universal Declaration of Human Rights¹⁰ to the two International Covenants on Human Rights,¹¹ and numerous ancillary instruments, both global and regional.

The Universal Declaration, the International Covenant on Civil and Political Rights and its Optional Protocol,¹² and the International Covenant on Economic, Social and Cultural Rights constitute what is commonly known as the International Bill of Human Rights.¹³ More than the familiar form, this developing International Bill of Human Rights has been greatly fortified in substance by various ancillary instruments dealing with particular categories of persons (*e.g.*, women, refugees, stateless persons, aliens, the elderly, youths, children, disabled persons), or particular values or subjects (*e.g.*, genocide, apartheid, discrimination, slavery, forced labor, torture, nationality, political participation, employment, education, marriage), by decisions and recommendations of international governmental organizations (especially by U.N. organs and entities), and by customary developments in the transnational arena.¹⁴

The general human rights prescriptions of the U.N. Charter—notably articles 1(3), 13(1), 55 and 56—were given somewhat more detailed specification in the Universal Declaration. The Universal Declaration has

9. U.N. CHARTER art. 1, para. 3.

10. *Adopted* Dec. 1948, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

11. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976. As of Dec. 31, 1987, 87 states were parties to this covenant.); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976. As of Dec. 31, 1987, 91 states were parties to this covenant.).

12. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976. As of Dec. 31, 1987, 40 states were parties to this treaty.).

13. UNITED NATIONS CENTRE FOR HUMAN RIGHTS, FACT SHEET NO. 2, THE INTERNATIONAL BILL OF HUMAN RIGHTS (1988).

14. For a convenient compilation of these documents, see UNITED NATIONS CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev.3, U.N. Sales No. E.88.XIV.1 (1988). For elaboration of a global bill of human rights in the dynamic and comprehensive sense, see HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 313-63.

acquired the attributes of authority in two ways. First, it is widely accepted as an authoritative specification of the content of the human rights provisions of the U.N. Charter. Second, its frequent invocation and application by officials, at all levels of government and in many communities around the world, have conferred on it those expectations characteristic of customary international law.¹⁵

The two Covenants and the Optional Protocol to the Covenant on Civil and Political Rights naturally are binding for all states that have ratified or acceded to them. In addition, like the Universal Declaration, they constitute not only authoritative interpretations of the Charter provisions on human rights, but are also vital components in the flow of communication that creates the expectations comprising customary international law. By further specifying the content of internationally protected human rights and providing structures and procedures (albeit with inadequacies) to remedy deprivations, they help stabilize authoritative expectations about the defense and fulfillment of human rights. In the same vein, a growing body of more particular conventions dealing with certain types of deprivations or deprivations has also fostered the enrichment and growth of the core content of the human rights prescriptions projected in the U.N. Charter.

Together, these important human rights instruments cover, in popular parlance, not only civil and political rights, but also economic, social and cultural rights. They extend to all basic values widely cherished: respect, power, enlightenment, well-being, wealth, skill, affection, and rectitude.¹⁶

15. See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 273-74, 325-30, and references cited therein; cf. UNITED NATIONS CENTRE FOR HUMAN RIGHTS, BULLETIN OF HUMAN RIGHTS, SPECIAL ISSUE, FORTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1988) [hereinafter BULLETIN OF HUMAN RIGHTS]. In his introduction to this special issue, Jan Martenson, Director-General of the U.N. Office at Geneva and Under-Secretary-General for Human Rights, opened with the following paragraph:

Nineteen eighty-eight marks the 40th anniversary of the Universal Declaration of Human Rights. The Declaration is nothing less than a monument to humankind, a veritable Magna Carta enumerating specific standards of achievement in the civil, political, economic, social, and cultural fields that had never been attempted before and which are valid for all members of the human family. In the years that have elapsed since the adoption of that bold and inspiring document, the international community has made great strides in translating the vision of the Declaration into global reality. Indeed, over fifty international instruments dealing with basically all aspects of human endeavour have been concluded since and have provided legal obligations to the primarily moral character of the Universal Declaration. Within this wide-ranging international code of human rights, the International Covenants on Human Rights take pride of place.

BULLETIN OF HUMAN RIGHTS, *supra*, at 1.

16. Values are preferred events—that which people cherish. The eight basic values are the following:

Respect: freedom of choice, equality, and recognition;

The authoritativeness of the Charter provisions on human rights, and the specification of these rights in the Universal Declaration and related instruments, have received tremendous fortification in the practice of international governmental organizations, especially the organs of the United Nations, and by regional efforts.¹⁷

Another important body of practice contributing to the establishment and maintenance of a global bill of rights is the customary international law of the responsibility of states concerning the treatment of aliens. In fact, the customary international law of state responsibility, in constant interaction with and as an integral part of the contemporary human rights movement, has contributed mightily to the sum total of the human rights protection, helping to lift the level of transnational protection of nationals and of aliens.

The upshot of this comprehensive and continuing prescription, ranging in modality from the most deliberate to the least deliberate, would appear to be that the core content of the various communications has been prescribed as a global bill of human rights. This bill is, in both form and policy content, much like those bills of rights created and maintained in some national communities.¹⁸ Its core content expresses the intensely demanded values of human rights around the world. Some call it a global bill of human rights, some talk in terms of *jus cogens*, some speak of customary law.¹⁹ The point is that there are crystallized expectations for the defense and fulfillment of human rights that are widely shared and articulated, even though the degree of protection and fulfillment differs from community to community.

Central to this developing corpus of international human rights law is the notion that every person is entitled to dignity simply because he or she is a human being. This body of law reflects the clear and universal recognition that the individual is the ultimate actor—the ultimate benefi-

Power: making and influencing community decisions;

Enlightenment: gathering, processing, and disseminating information and knowledge;

Well-being: safety, health, and comfort;

Wealth: production, distribution, and consumption of goods and services, control of resources;

Skill: acquisition and exercise of capabilities in vocations, professions, and the arts;

Affection: intimacy, friendship, loyalty, positive sentiments;

Rectitude: participation in forming and applying norms of responsible conduct.

See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 7-13. The aggregate of all these values may be described as security. For further elaboration of these values in the context of human rights, see *id.* at 7-37, 84-86. See also L. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 209-11 (1989).

17. See UNITED NATIONS, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 13-15, U.N. Doc. ST/HR/2/Rev.2, U.N. Sales No. E.83.XIV.2 (1983).

18. See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 313-20.

19. See *id.* at 317-19.

ciary or the ultimate victim—in all social interaction and decisionmaking, national or transnational. Hence, all the major human rights instruments of general scope (most notably the Universal Declaration and the two Covenants) are designed to apply to all human beings, irrespective of nationality.

The standard formula employed by the Universal Declaration is: “Everyone has the right to”²⁰ Negatively, the formula is: “No one shall be”²¹ “Everyone” refers to all human beings, regardless of nationality. In article 21, however, the Universal Declaration reserves two rights exclusively to nationals:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.²²

These provisions reflect the long-shared community expectation that differentiation on the basis of alienage is permissible in regard to participation in the making of local community decisions, namely, voting and holding office. The concern in the Universal Declaration that human rights be protected, regardless of nationality, is further manifested in the latter half of article 2: “Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”²³

This concern for the protection of all human beings, based on the same prescriptive formulas, is evident in both International Covenants on Human Rights. Even human rights conventions with a more restrictive focus are formulated generally in terms of every individual human being.

Similarly, two of the regional human rights conventions—European and American—are cast in broad language designed to protect all human beings, regardless of nationality, with exceptions clearly stipulated.²⁴

20. See Universal Declaration, *supra* note 10, arts. 3, 6, 8, 13, 14, 15(1), 17(1), 18, 19, 20(1), 22, 23, 24, 25(1), 26(1), 27.

21. *Id.* arts. 4, 5, 9, 11(2), 15(2), 17(2).

22. *Id.* arts. 21(1), 21(2); see also art. 13(2) (“Everyone has the right to leave any country, including his own, and to return to his country.”).

23. *Id.* art. 2.

24. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, 213 U.N.T.S. 221, (entered into force Sept. 3, 1953. As of Dec. 31, 1987, 21 states were parties to this convention.); American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23 doc. rev.2 (entered into force July 18, 1978. As of Mar. 1, 1988, 20 states were parties to this convention.).

The African Charter on Human and Peoples' Rights also employs the phrase "every individual."²⁵

In short, the principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard developed under earlier customary law. When the new human rights prescriptions are considered in their totality, they extend to all the basic human dignity values the peoples of the world today demand, and the more detailed standards specified with regard to each of these values exhibit all the precision that rational application either permits or requires. This makes the continuing debate about the doctrines of the minimum international standard and of national treatment highly artificial, because an international standard is now authoritatively prescribed for all human beings.²⁶ However, it does not follow, as elaborated below, that these new developments in substantive prescription about human rights have rendered obsolete the protection of individuals through the traditional procedures developed by the customary law of the responsibility of states for injuries to aliens.²⁷

III. The Customary International Law of Human Rights

Against the background of the developing global bill of human rights, the new *Restatement's* treatment of the customary international law of human rights takes on special significance, especially in view of the fact that the United States has ratified very few human rights treaties.²⁸ Section 702 of the *Restatement* reads:

25. African Charter on Human and Peoples' Rights, *adopted* June, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 I.L.M. 59 (1982) (entered into force Oct. 21, 1986. As of April 16, 1987, 33 states were parties to the Charter.). Unlike the other two regional human rights conventions, the African Charter enunciates "peoples' rights" in addition to "individual rights."

26. See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 74973; see also F. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1-7 (1974).

27. See *infra* Part VI.

28. "The customary law of human rights," it may be noted, "is part of the law of the United States to be applied as such by state as well as federal courts." RESTATEMENT (THIRD) § 70 2 comment c. Of approximately two dozen human rights treaties concluded under the auspices of the United Nations, the United States has ratified only the following: (1) Protocol Amending the Slavery Convention, *done* Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51 (entered into force Dec. 7, 1953, ratified by the United States Mar. 7, 1956); (2) Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957, ratified by the United States Dec. 6, 1967); (3) Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S.

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A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.²⁹

At first glance, this black-letter formula gives the impression of being rather conservative and restrictive. The accompanying comment, however, quickly dispels such an impression. According to comment a, the short list is designed to reflect “only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed.”³⁰ Moreover, the list, short and incomplete as it may be, is open-ended. In the words of the *Restatement*, “[t]his list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.”³¹ The *Restatement* further emphasizes that the violations of human rights cited in this section constitute “violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy.”³²

No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967, ratified by the United States Oct. 4, 1968); (4) Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135 (entered into force July 7, 1954, ratified by the United States July 7, 1976); and (5) Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951, ratified by the United States Nov. 4, 1988).

The executive branch has signed and submitted the following treaties to the Senate for its advice and consent to ratification, but the Senate has not yet acted on them: (1) International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, *supra* note 11; (2) International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969, submitted by President Carter to the Senate on Feb. 23, 1978); (3) Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, U.N. Doc. A/RES/34/180 (1979) (entered into force Sept. 3, 1981, submitted by President Carter to the Senate on Nov. 12, 1980); and (4) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, U.N. Doc. A/RES/39/46 (1984) (entered into force June 26, 1987, submitted by President Reagan to the Senate on May 23, 1988).

29. RESTATEMENT (THIRD) § 702.

30. *Id.* § 702 comment a.

31. *Id.*

32. *Id.* § 702 comment b.

The reporters were understandably cautious in formulating an innovative clause such as this; they settled for a short list selected from the rights embodied in the Universal Declaration of Human Rights, despite an ever growing shared expectation that the Universal Declaration, in its entirety, has become customary international law or simply reflects an authoritative interpretation of the human rights obligations of the U.N. Charter.³³ This reviewer would prefer to see a clear statement that affirms the customary law character of the Universal Declaration and, hence, expands the list of customary human rights under contemporary international law. The *Restatement* seems to toy with the idea but is less than straightforward.³⁴

Moreover, this reviewer would prefer to see the necessary and explicit statement about the open-ended nature of the customary law list be made part of the black-letter formula. As it is, item (g), "a consistent pattern of gross violations of internationally recognized human rights," cannot effectively serve such an open-ended function. Item (g), as the *Restatement* makes clear, differs in character from items (a) to (f):

The acts enumerated in clauses (a) to (f) are violations of customary law even if the practice is not consistent, or not part of a "pattern," and those acts are inherently "gross" violations of human rights. Clause (g) includes other infringements of recognized human rights that are not violations of customary law when committed singly or sporadically . . . [T]hey become violations of customary law if the state is guilty of a "consistent pattern of gross violations" as state policy. A violation is gross if it is particularly shocking because of the importance of the right or the gravity of the violation.³⁵

Even operating under the cautious posture taken by the *Restatement*, it would appear that, at a minimum, systematic discrimination based on sex, religion, and language deserves a place now along with "systematic racial discrimination." After all, the general norm of non-discrimination on grounds of race, sex, language, or religion has been clearly enunciated again and again in the U.N. Charter and a whole host of human rights instruments, and has served as a keystone of the contemporary international human rights law.³⁶ A major stated purpose of the U.N. Charter, reinforced by more detailed provisions, is to "achieve international cooperation . . . in promoting and encouraging respect for human rights and

33. See *supra* notes 15-17 and accompanying text.

34. See, e.g., RESTATEMENT (THIRD) § 702 reporters' note 1.

35. *Id.* § 702 comment m.

36. For elaboration, see HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 561-68. See generally *id.* at 561-796.

for fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁷

In its comment on customary law of human rights and *jus cogens*, the *Restatement* further points out that “[n]ot all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void.”³⁸ Such clarification makes it clear that candidates for future inclusion in the list of customary international human rights need not rise to the level of *jus cogens*. A *jus cogens*, a “peremptory norm of general international law,” as defined in article 53 of the Vienna Convention on the Law of Treaties, is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”³⁹ “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”⁴⁰ and, furthermore, “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”⁴¹

Though the obligations of the customary law of human rights are not necessarily *jus cogens*, they are *erga omnes*—obligations to all states.⁴² Hence, “a violation by a state of the rights of persons subject to its jurisdiction is a breach of obligation to all other states.”⁴³ The legal significance of this will be further developed in the next section, which discusses remedies.

IV. The Standard of Compensation for Expropriation of Alien Property

The standard of compensation for expropriation of alien property was one of the most hotly debated topics in the drafting process. The key provision is section 712, “State Responsibility for Economic Injury to Nationals of Other States,” which reads in part:

A state is responsible under international law for injury resulting from:

- (1) a taking by the state of the property of a national of another state that

37. U.N. CHARTER art. 1(3).

38. RESTATEMENT (THIRD) § 702 comment n.

39. Vienna Convention on the Law of Treaties, art. 53, adopted May 22, 1969, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/29 (entered into force Jan. 27, 1980).

40. *Id.*

41. *Id.* art. 64.

42. RESTATEMENT (THIRD) § 702 comment o, § 701 comment c.

43. *Id.* § 701 reporters’ note 3.

- (a) is not for a public purpose, or
- (b) is discriminatory, or
- (c) is not accompanied by provision for just compensation;

For compensation to be just under this subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.⁴⁴

While the new *Restatement* treats this subject in fewer sections and allocates the message and material among black letter rules, comments, and reporters' notes differently from the previous *Restatement*, it has made no significant change in substance.⁴⁵ As formulated, this provision represents a strong reaffirmation of the customary norm that permits a state to expropriate alien property only when a taking is for a public purpose, non-discriminatory, and is accompanied by just compensation. Acknowledging that this traditional norm has been challenged in recent years, the present *Restatement* reaffirms that the traditional rules, as embodied in sections 187-190 of the original *Restatement*,⁴⁶ "continue to be valid and effective principles of international law."⁴⁷ "Just compensation," reflecting the formula of "prompt, adequate and effective compensation" stressed by the United States,⁴⁸ is given further specification, so that disputes concerning the method of valuation of property can be minimized.

Though the final formulation appears to be acceptable even to opponents of earlier drafts, it did not come about without considerable debate.⁴⁹ Earlier drafts, exemplified by section 712 in Tentative Draft No. 13, provoked intense controversy,⁵⁰ stemming in large part from differing appraisals of the legal effect of certain key resolutions concerning expropriation adopted by the U.N. General Assembly, especially those which emanated from the drive to establish a new international economic order.⁵¹

44. *Id.* § 712.

45. *See* RESTATEMENT (SECOND) §§ 184-196.

46. *Id.* §§ 187-190.

47. RESTATEMENT (THIRD) § 712 comment b.

48. *Id.* § 712 comment c, reporters' note 2. The classic position on "prompt, adequate and effective" compensation was first made by Secretary of State Cordell Hull. *See* 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-60 (1942).

49. *See, e.g.,* Clagett & Poneman, *Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 22 INT'L LAW. 35 (1988).

50. *See, e.g.,* Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73 (1984); Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984).

51. *See infra* notes 54-76 and accompanying text.

The subject of expropriation, as Justice John Harlan noted in the *Sabbatino* case, has been one of the most controversial areas in contemporary international law.⁵² Beginning with the nationalization measures taken by the Soviet and Mexican revolutionary governments following World War I, differences of opinion developed over what constitutes a lawful taking under international law. The debate has intensified with the rapid multiplication of newly independent states after World War II. Although the "public purpose" and "nondiscrimination" criteria are generally accepted, controversy rages over the issue of compensation.

Most Communist states, in theory at least, contend that no compensation is required. Such a position accords with the general Soviet rejection of the binding nature of customary international law. In practice, however, Communist states have not generally acted on this theory, no doubt for practical reasons. Since World War II, more than seventy agreements signed by Communist states have included a compensation requirement.

Capital-exporting states generally follow the customary law mentioned above and insist that a taking of property be accompanied by compensation. They may differ, however, on what precisely the standard of compensation entails—"prompt, adequate, and effective" compensation or simply "just," "full," or "appropriate" compensation.⁵³

Conversely, capital-importing states increasingly assert that whether and how much, if any, compensation is granted depends on the circumstances. The backbone of this contention is the assertion that all states exercise "permanent sovereignty" over their natural resources. The relevant factors are said to include the entire historical relations between the foreign enterprise and the host state; the ability of the taking state to pay compensation; the degree of unjust enrichment, if any, on the part of the taking state; the extent of prior exploitation by the foreign enterprise; and

52. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-29 (1963). For controversies concerning expropriation under international law, see generally 1-4 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* (R. Lillich ed. 1972, 1973, 1975 & 1987); G. WHITE, *NATIONALISATION OF FOREIGN PROPERTY* (1961); M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* (1986); Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295 (1975); Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981); Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 HAGUE RECUEIL DES COURS 259 (1982); Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon the Contemporary International Law Debate*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 89 (R. Lillich ed. 1983); Jimenez de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179 (1978); Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984).

53. Cf. Clagett & Poneman, *supra* note 48, at 45-46.

the extent of undue advantage enjoyed by the foreign property owner before expropriation.⁵⁴ In support of their position, the capital-importing states rely especially on the resolutions adopted in 1974 by the General Assembly as a drive toward a New International Economic Order: the Declaration and Programme of Action on the Establishment of a New International Economic Order (Resolution 3201) and the Charter of Economic Rights and Duties of States (Resolution 3281).⁵⁵

More specifically, the debate centers on the relative authority of paragraph 4 of Resolution 1803, on Permanent Sovereignty over Natural Resources (1962), vis-a-vis article 2(2)(c) of Resolution 3281, the Charter of Economic Rights and Duties of States (1974), and paragraph 3 of Resolution 3171. Paragraph 4 of Resolution 1803 declares:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interest, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.⁵⁶

In contrast, article 2(2)(c) of the Charter of Economic Rights and Duties of States (Resolution 3281) declares that each state has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.⁵⁷

Paragraph 3 of Resolution 3171, similar to article 2(2)(c), states that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possi-

54. Cf. Jimenez de Arechaga, *supra* note 51.

55. G.A. Res. 3201, U.N. GAOR, 6 Spec. Sess. Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

56. G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962).

57. G.A. Res. 3281, *supra* note 54.

ble compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measure.⁵⁸

In sum, Resolution 1803 emphasizes the payment of "appropriate compensation" in accordance with "international law" and settlement of the dispute "through arbitration or international adjudication," while Resolutions 3281 and 3171 leave it to the expropriating state to determine appropriate compensation and to settle any dispute according to its domestic law and tribunals. Thus, the latter represent an attempt to remove the matter of compensation for expropriated property entirely out of the realm of international law and to place it within the domain of national law.

Obviously, the two positions are incompatible. Which one, then, is authoritative?

This issue was highlighted in the arbitral award of *Texaco Overseas Petroleum v. Libyan Arab Republic*,⁵⁹ which involved claims against Libya for its nationalization of all of the rights, interests, and property of two international oil companies in Libya. The two oil companies relied heavily on Resolution 1803, but Libya strongly invoked, among others, Resolution 3171 and article 2(2)(c) of Resolution 3281. Though Libya refused to take part in the arbitral proceedings, it set forth its position in a memorandum to the president of the court. The sole arbitrator, Rene-Jean Dupuy (appointed by the president of the International Court of Justice), rejected Libya's claim that "any dispute relating to nationalization or its consequences should be decided in conformity with the provisions of the municipal law of the nationalizing State and only in its courts,"⁶⁰ and delivered an award on the merits in favor of the companies.

Dupuy discussed the legal effect of U.N. General Assembly resolutions in general and that of the above-mentioned resolutions in particular. He noted that the "legal value" of U.N. resolutions "differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions."⁶¹ Hence, in "appraising the legal validity of the above-mentioned Resolutions," he resorted to "the criteria usually

58. G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973).

59. *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Libyan Arab Republic* (Award on the Merits, Jan. 19, 1977), *trans. into English and reprinted in* 17 I.L.M. 1 (1978).

60. *Id.* at 31, para. 90.

61: *Id.* at 29, para. 86.

taken into consideration, i.e., the examination of voting conditions and the analysis of the provisions concerned.”⁶²

Noting that Resolution 1803 was “passed by the General Assembly by 87 votes to 2, with 12 abstentions,” he stressed that the majority voting for this text included “many States of the Third World” and “several Western developed countries with market economies, including the most important one, the United States.”⁶³ He pointed out, however, that the conditions under which Resolutions 3171 and 3281 were adopted were “notably different.” The “specific paragraph concerning nationalization, disregarding the role of international law,” as contained in Resolution 3171, “not only was not consented to by the most important Western countries, but caused a number of the developing countries to abstain.”⁶⁴ Similarly, “paragraph 2(c) of article 2 of the Charter, which limits consideration of the characteristics of compensation to the State and does not refer to international law, was voted by 104 to 16, with 6 abstentions, all of the industrialized countries with market economies having abstained or having voted against it.”⁶⁵

Thus, “only Resolution 1803” was “supported by a majority of Member States representing all of the various groups.”⁶⁶ In contrast, the other resolutions were “supported by a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade.”⁶⁷ “On the basis of the circumstances of adoption mentioned above and by expressing an *opinio juris communis*,” he concluded that Resolution 1803 “seems to this Tribunal to reflect the state of customary law existing in this field.”⁶⁸ He further stated that “[t]he absence of any connection between the procedure of compensation and international law and the subjection of this procedure solely to municipal law cannot be regarded by this Tribunal except as a *de lege ferenda* formulation, which even appears *contra legem* in the eyes of many developed countries.”⁶⁹ This position is “further reinforced by an examination of the general practice of relations between States with respect to investments.”⁷⁰

62. *Id.* at 28, para. 83.

63. *Id.* at 28, para. 84.

64. *Id.* at 29, para. 85.

65. *Id.*

66. *Id.* at 30, para. 86.

67. *Id.*

68. *Id.* at 30, para. 87.

69. *Id.* at 30, para. 88.

70. *Id.* at 30, para. 89.

Significantly, the Iran-United States Claims Tribunal—with a highly respected membership and an active docket—has also upheld the customary standard of “full” compensation in a series of recent decisions.⁷¹ For example, in *Sedco, Inc. v. National Iranian Oil Company and the Islamic Republic of Iran*,⁷² the Tribunal considered “what is the applicable standard of compensation under customary international law.”⁷³ The Tribunal first observed that “‘the overwhelming practice and the prevailing legal opinion’ before World War II supported the view that customary international law required compensation equivalent to the full value of the property taken.”⁷⁴ “It is only since those days,” the Tribunal added, “that this traditional legal standpoint has been challenged by a number of States and commentators.”⁷⁵ What was the response of the Tribunal to this challenge?

The Tribunal, as in the *Texaco* case discussed above, first affirmed the validity of Resolution 1803 in these words: “There is considerable unanimity in international arbitral practice and scholarly opinion that of the resolutions cited above, it is Resolution 1803, and not either of the two later resolutions [General Assembly Resolutions 3201 and 3281], which at least reflects, if it does not evidence, current international law.”⁷⁶ It concluded that

Opinions both of international tribunals [including this very Tribunal] and of legal writers overwhelmingly support the conclusion that under customary international law in a case such as here presented—a discrete expropriation of alien property—full compensation should be awarded for the property taken. This is true whether or not the expropriation itself was otherwise lawful.⁷⁷

With the clear reaffirmation of the customary standard of just compensation, the next question is what constitutes just compensation. For compensation to be “just,” section 712 further specifies, “it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.”⁷⁸ This method of val-

71. See Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639 (1987).

72. Award No. ITL 59-129-3 (Mar. 27, 1986), reprinted in 25 I.L.M. 629 (1986).

73. *Id.* at 632.

74. *Id.* (footnote omitted).

75. *Id.*

76. *Id.* at 634.

77. *Id.* (footnote omitted).

78. RESTATEMENT (THIRD) § 712.

uation of the property taken reflects, in general, what is traditionally meant by "prompt, adequate, and effective," "full," or "just" compensation.⁷⁹ What has caused some concern is the built-in exception of "exceptional circumstance."⁸⁰ The *Restatement* does not define it but offers two examples: (1) "takings of alien property during war or similar exigency,"⁸¹ and (2) "expropriation as part of a national program of agricultural land reform."⁸² Obviously, an exceptional rule of this nature does not lend itself to exact specification but requires application in a disciplined manner by reference to the totality of factors involved in a particular context. I believe such flexibility would facilitate adequate consideration of the legitimate aspirations and genuine grievances of the taking state in the search for the common interest of all parties concerned.⁸³

V. The Rights of Aliens

Chapter Three, dealing with individual rights in foreign relations under the law of the United States, begins by setting forth in section 721 the applicability of constitutional safeguards:

The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.⁸⁴

It is made abundantly clear that "[a]ny exercise of authority by the United States in the conduct of foreign relations is subject to the Bill of Rights and other constitutional restraints protecting individual rights."⁸⁵

The *Restatement* then shifts focus to the "Rights of Aliens," stating:

(1) An alien in the United States is entitled to the guarantees of the United States Constitution other than those expressly reserved for citizens.

(2) Under Subsection (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinctions between aliens and citizens, or between different categories of aliens.⁸⁶

79. *Id.* § 712 comment d; *cf. supra* note 48 and accompanying text.

80. *See, e.g.,* Clagett & Poneman, *supra* note 49, at 43-45.

81. RESTATEMENT (THIRD) § 712 comment d.

82. *Id.* § 712 reporters' note 3.

83. *Cf. L. CHEN, supra* note 16, at 301-15, 357-69 (discussing use of the economic instrument and the prescribing function in international law).

84. RESTATEMENT (THIRD) § 721.

85. *Id.* § 721 comment a.

86. *Id.* § 722.

Section 722 represents what a commentator called a "domestic approach," with an inordinate reliance on domestic judicial decisions.⁸⁷

A remarkable feature in the present *Restatement*, as previously stated, is the conjunction of the international law of human rights and the customary law of state responsibility regarding injury to aliens.⁸⁸ It would have been immensely helpful if the *Restatement* had gone a step further in clarifying in Chapter Three the rights of aliens in the United States not only from a constitutional law perspective, but also from an international law perspective, examining the interrelations between domestic and international law, including the degree of congruence and incongruence, the gaps and the differences, and the task of integration.

In addition, a special category of aliens, namely refugees, deserves much greater attention, given the ever growing importance of refugee problems for the world community in general and for the United States in particular.⁸⁹ Such a discussion would be appropriate since the *Restatement* is partly concerned with "domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences."⁹⁰ Although the United States has ratified the 1967 Protocol Relating to the Status of Refugees⁹¹ and enacted the Refugee Act of 1980,⁹² the *Restatement* gives refugee problems only a cursory treatment under section 711 rather than here.⁹³ The Refugee Act contains two key principles: granting asylum to those who have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"⁹⁴ and prohibiting the forcible return (deportation) of aliens whose "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or

87. Nafziger, *Restating the Rights of Aliens*, 25 VA. J. INT'L L. 125, 129-31 (1984).

88. See *supra* notes 6-27 and accompanying text.

89. On refugee problems see generally T. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 615-743 (1985); A. DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987); G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983); A. LIEBOWITZ, *IMMIGRATION LAW AND REFUGEE POLICY* (1983); A. GRAHL-MADSEN, *TERRITORIAL ASYLUM* (1980); *Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng. (1979); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *A MANDATE TO PROTECT AND ASSIST REFUGEES* (1971).

90. RESTATEMENT (THIRD) § 1(b).

91. Protocol Relating to the Status of Refugees, done Jan. 31, 1967, G.A. Res. 2198, 21 U.N. GAOR Supp. (No.16) at 48, U.N. Doc. A/6316, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967, for the United States Nov. 1, 1968. As of Dec. 31, 1987, 101 states were parties to this treaty.).

92. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

93. See RESTATEMENT (THIRD) § 711 reporters' note 7.

94. 8 U.S.C. § 1101(a)(42) (1982).

political opinion.”⁹⁵ The growing importance of this field is illustrated by the two recent decisions of the U.S. Supreme Court: *INS v. Stevic*⁹⁶ and *INS v. Cardoza-Fonseca*.⁹⁷ *Stevic* applies the “clear probability” standard to govern withholding of deportation proceedings, and *Cardoza-Fonseca* applies the “well-founded fear” standard to govern asylum proceedings. The latter, giving more consideration to subjective elements, is deemed more generous to the asylum seeker.⁹⁸

VI. Remedies for Violations of Human Rights Obligations

A central concern in the field of human rights is to enable victims or others to bring complaints to authoritative decisionmakers for remedy of human rights deprivations. As Justice Oliver Wendell Holmes, Jr. noted long ago, a right without a remedy is not a real right. The reporters of the new *Restatement* were properly sensitive to this dimension. Thus, it is highly significant that the *Restatement* emphasizes that in principle the special avenues for remedies supplement and reinforce, but do not replace, ordinary remedies available under international law.⁹⁹ The *Restatement* considers the general principles of remedies for violations of international law in Part IX¹⁰⁰ and remedies for particular violations of international law dealing with injuries to private persons in sections 703 and 713. Section 703 discusses remedies for violations of human rights obligations; section 713 considers remedies for injuries to aliens.

95. *Id.* § 1253(h)(1).

96. 467 U.S. 407 (1984).

97. 480 U.S. 421 (1987).

98. *Id.* at 428-31. The *Cardoza-Fonseca* Court stated:

In *Stevic*, we rejected an alien's contention that the § 208(a) “well-founded fear” standard governs applications for withholding of deportation under § 243(h). Similarly, today we rejected the Government's contention that the § 243(h) standard, which requires an alien to show that he is more likely than not to be subject to persecution, governs applications for asylum under § 208(a). Congress used different, broader language to define the term “refugee” as used in § 208(a) than it used to describe the class of aliens who have a right to withholding of deportation under § 243(h). The [Refugee] Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980. In addition, the legislative history of the 1980 Act makes it perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for § 243(h) relief.

Id. at 423-24 (footnote omitted).

99. See RESTATEMENT (THIRD) § 703 comment a.

100. RESTATEMENT (THIRD) pt. IX, §§ 901-907.

Under customary international law concerning state responsibility for injury to aliens, the typical remedy is that of diplomatic protection.¹⁰¹ Since an injury to an alien, as popularized by Vattel, is perceived to be an injury to the state of nationality, this remedy requires the nationality link and permits the state of nationality to protect injured persons and to espouse their claims against other states under the normal requirements of exhaustion of local remedies. The protecting state, having interests independent of those of the injured persons, enjoys discretion whether to espouse claims on behalf of its nationals at the international level. Because of their overriding concern for national interests of all sorts (such as minimizing friction with a friendly nation), state elites may give short shrift to deprived persons, placing them largely at the mercy of state officials.¹⁰² Nevertheless, this important remedy has historically served the function of protecting the interests not only of the state but also of private persons, even in an era when the nation-state was often regarded as “the exclusive and sole subject” of international law and international tribunals and other transnational arenas of authority were generally closed to claims by private persons.

Contemporary international human rights law, inspired by more catholic conceptions of the subjects of international law, has added an important dimension to the traditional state-centered claim system. With the increasing recognition of the rights of private persons, various arrangements and remedies are made available to protect these rights. Thus, in addition to the state-to-state complaint system, individuals have gained, for remedy of deprivations, either direct or derivative access to transnational arenas of authority, both global and regional. Notable among them are: the U.N. Commission on Human Rights, Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the European Commission on Human Rights, and the Inter-American Commission on Human Rights.¹⁰³ Yet

101. See generally E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* (1919); F. DUNN, *THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW* (1932); HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 866-78; L. SOHN & R. BAXTER, *CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS* (1961); Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 (Supp.) AM. J. INT'L L. 131 (1929).

102. See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 867-68.

103. See *id.* at 192-98, 278-89, 774-76; see generally T. BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* (1988); *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (H. Hannum ed. 1984); 1 & 2 *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* (T. Meron ed. 1984); T. MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS* (1986); A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (2d ed. 1982); P. SIEGHART, *THE INTERNATIONAL LAW OF*

the prospect of further direct access by individuals to authoritative transnational arenas, though encouraging, remains far from adequate.

As long as states remain the most important and most effective participants in transnational processes of decision, espousal of claims by states for deprivations suffered by private persons would appear indispensable to full protection in the common interest. The traditional channels of protection through a state, together with the newly developed procedures under the contemporary human rights program of claims by individuals, achieve a cumulative beneficent impact in the protection of private persons. Remedy through claims by a protecting state and through individual petition need not be mutually exclusive; they can be made to reinforce each other for the better defense of the human rights of the individual.¹⁰⁴

Finally, it may be recalled that the obligations of customary international law of human rights are, according to the authors of the *Restatement*, obligations by each state to all other states—*erga omnes*.¹⁰⁵ Hence, they conclude that “any state may pursue remedies for their violation, even if the individual victims were not nationals of the complaining state and the violation did not affect any other particular interest of that state.”¹⁰⁶

VII. Conclusion

The *Restatement (Third) of the Foreign Relations Law of the United States*, in the area of protecting both natural and juridical persons, promises to exert significant impact on those who are concerned with the tasks of making, invoking, applying, or appraising international law, including transnational and national decisionmakers, policy advisors, practitioners, and scholars—dissenting voices notwithstanding. Its contributions are reassuring, innovative, progressive, and enormous, helping chart a path of great potential for the better protection and fulfillment of human rights. The reporters and the American Law Institute deserve high marks and congratulations for a difficult task well done.

HUMAN RIGHTS (1983); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed. 1981); 1 & 2 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (K. Vasak ed. 1982).

104. See HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 6, at 774-76 and sources cited therein.

105. See *supra* notes 42-43 and accompanying text.

106. RESTATEMENT (THIRD) § 703 comment b.